

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2000-659

January 18, 2001

PIERSON & BURNETT
Request for an Advisory Opinion
Regarding LighTrade, Inc.

ADVISORY RULING

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. SUMMARY

On July 19, 2000, the regulatory counsel to LighTrade, Inc. filed a request for “an opinion by the Maine Public Utilities Commission as to whether LighTrade’s services are subject to regulation in Maine, requiring a Certificate of Public Convenience and Necessity (CPCN) or other license, prior to operation.” In this Advisory Ruling issued pursuant to Chapter 110, § 601 of our Rules of Practice and Procedure, we find, based on the facts as presented in LighTrade’s letter, that it does require a certificate of public convenience and necessity.

II. DISCUSSION

LighTrade’s counsel states that:

LighTrade plans to deploy carrier-neutral “pooling points,” which will provide immediate provisioning and Quality of Service (“QoS”) monitoring services for the delivery of telecommunications capacity sold or traded among other carriers. LighTrade’s mission is to facilitate the availability of broadband solutions to users and service providers by providing a means for the more efficient distribution and use of telecommunications capacity, *by operating a switch into which many carriers will connect, so that telecommunications bandwidth, when sold by one carrier to another, can be routed effectively.*

LighTrade will provide a seamless interconnection point, offering a real time provisioning capability and efficient delivery of capacity. LighTrade pooling points will enable the instantaneous transfer of bandwidth between multiple entities and will serve as a catalyst both for the development of a more efficient bandwidth market and a ubiquitous series of aggregation points for broadband services.

LighTrade will provide these services to multiple exchanges and other platforms offering the fastest, most reliable way of connecting the buyers and sellers. In exchange for its services, LighTrade will collect a port usage fee and a fee for the real time-provisioning function. The port charge will be a fixed fee based on the type of port (i.e., DS3, OCN). The real time-provisioning fee will be structured based on the capacity being provisioned and ultimately delivered through the LighTrade switching platform.

(emphasis added).

A “telephone utility” is defined in 35-A M.R.S.A. § 102(19) as “every person, its lessees, trustees, receivers or trustees appointed by any court, owning, controlling, operating or managing any telephone line for compensation within this State.” A “telephone line” is defined in 35-A M.R.S.A. § 102(20) as including:

all conduits, ducts, poles, wires, tables, instruments and appliances . . . and all other real estate, fixtures and personal property owned, controlled, *operated or managed in connection with or to facilitate communication by telephone*, whether that communication is accomplished with or without use of transmission wires. (emphasis added)

Under the facts described by LighTrade, it is clearly owning or operating telecommunications equipment for the purpose of providing telephone services to other carriers.

The question of whether an entity is a public utility does not necessarily end with the statutory definition. An entity must be devoted to the “public use” before it will be subject to regulation. *Dickenson v. Maine Public Service Co.*, 224 A.2d 349, 438 (Me. 1968). This Commission has looked at a number of factors that may be considered in determining “public use,” including:

1. The size of the enterprise;
2. Whether the enterprise is operated for profit;
3. Whether the system is owned by the user(s);
4. Whether the terms of service are under the control of its user(s);
5. The manner in which the services are offered to prospective user(s);

6. Limitation of service to organization members or other readily identifiable individuals; and
7. Whether membership in the group (e.g., whether taking service) is mandatory.

Kimball Lake Shores Association, Issuance of Show Cause Order (Me.P.U.C., January 31, 1980). It is clear that LighTrade tends to offer its services for compensation, and presumably, profit; and it will be offering its services to a discrete but significant segment of the public, i.e., “buyers and sellers” of high speed “telecommunications capacity.” None of the terms of service are within the control of its customers. Therefore, it meets the public use test.

LighTrade does not specifically argue that its proposed services should be considered non-utility services because they are not offered at retail. We have, however, addressed that issue in *Central Maine Power Company, Application to Invest Funds in Telecommunications Project and Approval of Related Affiliated Interest Transactions*, Docket No. 96-537, Order Regarding Public Utilities Status (Dec. 2, 1997). In that case, we rejected a portion of a stipulation that “appear[ed] to conclude that FCM [FiveCom Maine] is not a public utility because it will provide facilities only to telecommunications providers and not directly to customers at retail.” We stated:

We do not find this to be a sufficient reason alone to conclude that FCM is not a public utility; the definition of public utility under Maine law does not make any distinction based on wholesale or retail service. 35-A M.R.S.A. § 102(19). Moreover, we have historically regulated the wholesale (access) rates of telephone utilities that provide both retail and wholesale service.

We note that our that our decision that LighTrade is a public utility does not imply anything about the extent of regulatory scrutiny of LighTrade’s operations or rates.

III. CONCLUSION

For the foregoing reasons, we find, based on the facts as represented by counsel for LighTrade, that LighTrade, Inc., would be a public utility in the State of Maine, and would require a certificate of public convenience and necessity if it were to operate and provide services as described.

Dated at Augusta, Maine, this 18th day of January, 2001.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
 Nugent
 Diamond

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Civil Procedure, Rule 73, et seq.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.